COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT
DIVISION I
CASE NO. 98-CI-01230

LARRY SABO — PLAINTIFF

v.

CITY OF OWENSBORO, et. al. — DEFENDANTS

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OPINION AND SUMMARY JUDGMENT

This matter is before the Court on the Motions of both the Plaintiff and the Defendants for Summary Judgment. The parties having fully briefed the issues and having heard the arguments of the parties, this matter is ripe for consideration by the Court. For the reasons set forth below, the Motion of the Defendants is granted and Plaintiff's Motion is denied.

FACTS

Plaintiff alleges that the Owensboro Board of Commissioners (the Board) wrongfully terminated him in violation of KRS 90.310 *et. seq.*, when it released him from his probationary appointment as Director of Finance and Administration on September 17, 1998. (See Complaint at ¶ 6 through 8). Plaintiff alleges that, pursuant to KRS 90.350(9), he obtained status as a regular, full-time civil service employee by serving in excess of the twelve (12) months in the position of Director of Finance and Administration. (See Complaint at ¶¶ 9 and 11). In light of Plaintiff's allegations, both parties agree that Plaintiff's claim turns on a

pure question of law involving the statutory construction of KRS 90.350(9). Accordingly, the factual circumstances of Plaintiff's employment are not material to the disposition of the case. Nevertheless, the Court will assume for purposes of the motions for summary judgment that the following facts are undisputed by the parties.

On February 1, 1997, Plaintiff was given probationary appointment as Director of Finance and Administration for the City of Owensboro. In December, 1997, prior to the twelfth month anniversary of Plaintiff's probationary appointment, Plaintiff was involved in a complaint regarding allegations of discrimination by a co-worker. Accordingly, the city manager told Plaintiff on December 16, 1997 that he was considering extending Plaintiff's probation beyond February 1, 1998. With the Plaintiff's concurrence, an outside investigator/conciliator was hired by the City during February , 1998. Again, in an effort to resolve the matter prior to having the Board, as the appointing authority pursuant to KRS 90.350(9) , make its final determination with respect to Plaintiff's employment status, the city manager advised Plaintiff on February 13, 1998 that he was going to extend Plaintiff's probationary appointment until the discrimination matter was resolved. The fact-finding investigation of the grievance was not completed until some time in March, 1998.

Once the investigation was concluded the city manager placed the regular appointment of the Plaintiff on the Board's agenda and the Board, as the appointing authority, had its first opportunity to address Plaintiff's appointment to regular, full-time civil service status on April 7, 1998. After meeting with the Plaintiff in closed session on April 7, the Board deferred action to permit further discussion of whether Plaintiff was satisfactory for appointment. The Board met again with Plaintiff in closed session on April 20, 1998. During

the Board's meeting of April 22, 1998, Plaintiff, through his former attorney, proposed to the Board that rather than voting on his appointment at that time, he would be willing to agree to an extension of his probationary period until October 7, 1998 in order to prove himself satisfactory to the Board. Plaintiff's proposal was accepted by the Board and was memorialized in the written "Agreement" of May 11, 1998, that has been entered into the record which provided that his probationary period would be extended for a period ending no later than October 7, 1998.

On September 17, 1998, the Board, as the appointing authority, considered the appointment of the Plaintiff to regular civil service status and voted to release him from his probationary employment. Plaintiff now claims that he attained regular civil service status in February, 1998.

DISCUSSION

The dispositive issue of law involves Plaintiff's employment status at the time of his release in September, 1998. Specifically, whether Plaintiff was an at-will employee as a probationary appointee, or a regular civil service employee. Thus, this matter turns on the statutory construction of KRS 90.350(9). This statute provides:

> The appointing authority may provide that all appointments for initial permanent employment may be probationary appointments for a period of not more than twelve (12) months, ***after which*** probationary period regular appointments shall be given to all probationary employees ***who are deemed to be satisfactory by the respective appointing authority.*** (emphasis added.)

Plaintiff contends that, since the statute provides for a "probationary appointment for a period of not more than twelve (12) months," he automatically attained regular civil service

status following his first twelve (12) months of probationary employment. Defendants, on the other hand, contend that an affirmative determination by the Board, as the appointing authority, that the employee is "deemed to be satisfactory" is required before any employee can obtain regular civil service status. The Court finds that affirmative action by the Board was required to accord the Plaintiff regular civil service status.

In interpreting the provisions of any statute, the Court must first look at the "plain language of the statute in its ordinary sense, unless such a straight forward interpretation will lead to illogical or ludicrous results." *Wells v. Baker*, Ky. App., 713 S.W.2d 476, 478 (1986). The plain language of the statute requires an affirmative determination by the appointing authority that the employee is "deemed to be satisfactory" before any employee attains regular civil service status. This construction is consistent with the legislative intent. *See Thurman v. Commonwealth of Kentucky, Cabinet for Human Resources*, Ky. App., 828 S.W.2d 368, 370 (1992) (The Court's function in construing a statute is to interpret the language so as to give effect to the intent of legislature.).

It was clearly the intent of the legislature to have the appointing authority make an affirmative determination that the employee is satisfactory before regular civil service status is conferred on a municipal employee. Otherwise, the legislature would have included the language contained in KRS 18A.111(1), the parallel probationary period statute for state merit employees. This statute provides:

> Unless the appointing authority notifies the employee prior to the end of the initial probationary period that he is separated, the employee shall be deemed to have served satisfactorily and shall acquire status in the classified service period.

The legislature's recognition of these distinct means of appointment is apparent from the statutory predecessor to KRS 18A.111(1). Subsection (9) of 18.210 originally provided for affirmative action by the appointing authority for the appointment of state merit employees to regular status, but the statute was amended by Chapter 86, Section 5, of the 1976 Acts, as follows:

> (8) For a period of probation not to exceed one (1) year before appointment or promotion may be complete, and during which period a probationer may be discharged or reduced in class or rank, or replaced on the eligible list. *Unless the appointing authority notifies the employe prior to the end of the probationary period that the employe's services are not satisfactory, the employe shall have status in the classified service. The notice shall be in writing and as provided by personnel rules;* ~~The appointing authority shall, within thirty (30) days prior to the expiration of an employe's probationary period, notify the commissioner in writing whether the probationary employe is recommended for permanent status. Only if the appointing authority certifies to the satisfactory nature of the probationary employe's services, shall permanent status be conferred;~~

The statutory language of KRS 18A.111(1) now explicitly permits a state merit employee to be "deemed to have served satisfactory" without an affirmative determination by the appointing authority. If the legislature had intended for a city probationary civil service employee to acquire regular civil service status without an affirmative action of the appointing authority, the legislature would have included similar language in KRS 90.350(9). This statutory construction is consistent with the maxim of *expressio unius est exclusio alterius*, meaning that the expression of one thing is the exclusion of another. *See Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387 (1939); *Allen v. Hollingsworth*, 246 Ky. 812, 56 S.W.2d 530 (1933).

This construction of KRS 90.350(9) is further supported by the recent Supreme Court decision in *The Evangelical Lutheran Good Samaritan Society, Inc. v. Albert Oil Co.*, Ky., 969 S.W.2d 691 (1998). In *The Evangelical Lutheran*, the issue was whether "the 90 day period

set out in KRS 100.211(7) during which a local body or fiscal court must take final action on a planning and zoning recommendation regarding a proposed zoning amendment" was mandatory. *Id.* at 692. Since the statute specifically provided for a 90 day time period in which the fiscal court or legislative body had to take action, or otherwise "be deemed to have passed by operation of law," the Court held that "the legislative directive is clearly evident in the statute, that is, specific consequences related to inaction by the board are statutorily provided." *Id.* at 693.

The Court in *The Evangelical Lutheran* contrasted its earlier decision in *Ratliff v. Phillips*, Ky., 746 S.W.2d 405 (1988), where it held that failure of a Board of Adjustment to render a decision within the time prescribed by statute did not "automatically divest it of jurisdiction". *Id.* at 406. The Court in *Ratliff* refused "to imply language which the statute does not contain," *Id.*, and instead held that the remedy for failure to act is a writ of mandamus after the expiration of the time allowed. The Court in *The Evangelical Lutheran* pointed out that "(t)he *Ratliff* decision turned on the absence of any statutory language establishing the consequences of the failure to act by the Board." *The Evangelical Lutheran*, supra, at 693.

Unlike the statute at issue in *The Evangelical Lutheran*, KRS 90.350(9) does not provide for a specific time period in which the appointing authority must act after the twelve (12) month probationary period and, more important, the statute does not specifically state the consequences related to "inaction" by the appointing authority. Again, if the legislature had intended "automatic" regular civil service status as a consequence for failure to act by the Board, the legislature would have included language similar to that contained in KRS 18A.111(1).

The Plaintiff argues that the failure of the Board to act on his appointment "immediately before or immediately after" the expiration of his twelve month probationary period permits the Board to render the legislature's directive that a probationary period not exceed twelve months a nullity, and permits an appointing authority to arbitrarily prevent an employee from attaining regular status. While there may be circumstances where a delay in acting on an appointment reflects an attempt to thwart the statute's dictates as to length of probation, the facts, as claimed by the Plaintiff, certainly show otherwise. Furthermore, the Court in *Ratliff v. Phillips*, Ky., 746 S.W.2d 405 (1988), held that a writ of prohibition would lie to require a public body to act if it failed to do so within the time prescribed by statute.

The Plaintiff acknowledges that he himself wanted to clear his name regarding the "discrimination" issue which was alleged to have occurred during his twelve month probationary period. The City hired an "investigator/conciliator" to explore the claim. This process was not completed until some time in March. At the Board's first meeting in April it considered the Plaintiff's appointment. Discussions between the Board and the Plaintiff continued on April 20. Then when his appointment was up for consideration on April 22, it was the Plaintiff, through his counsel, who asked the Board to extend his probationary period another six months.

It is the Plaintiff who sought to delay action on his appointment, first by seeking to "clear his name" and then by requesting time to allow himself to reverse what he perceived as his impending release by the Board. It is disingenuous for the Plaintiff now to argue that delay by the Board on the appointment ripened into automatic status and that the clear directive

of the statute that the appointing authority must deem an employee satisfactory was intended by the legislature not to apply if the appointing authority defers action on an appointment.

The Plaintiff also places great reliance on the city manager's initial recommendation of the Plaintiff for regular status and what the Plaintiff claims is substantial evidence that he did perform satisfactorily. Although these facts may be in dispute, they are not relevant to a determination of the legal issue to be resolved. First, under KRS 90.350(9), it is the Board, not the city manager, who is charged with determining if the Plaintiff was satisfactory. Second, if the Plaintiff was an at-will probationary employee, he could be dismissed in the unfettered discretion of the Board. *Louisville Professional Fire Fighters Association v. City of Louisville*, Ky., 508 S.W.2d 42, 43 (1974). Therefore, it is not for this Court to evaluate the Plaintiff's performance, but only to decide if he attained regular civil service status. Furthermore, if he had attained regular status, his discharge would be governed by KRS 90.360 and the matter would be heard by the civil service commission, not this Court.

Accordingly, the Court finds that the plain language of the statute and the legislative intent supports the conclusion that an affirmative determination by the appointing authority that the employee is deemed to be satisfactory is required before an employee can obtain regular civil service status. Thus, the Court finds that the Plaintiff was an at-will employee at the time the Board released Plaintiff on September 17, 1998. As a probationary employee, the Board, as employer, has "unfettered discretion in deciding whether to retain a probationary employee."

Having found Plaintiff to be an at-will employee at the time of his release, Plaintiff did not have a constitutionally protected interest in this position. *See Hooks v. Smith*,

Ky. App., 781 S.W.2d 522, 523 (1989). Thus, both Plaintiff's wrongful discharge and constitutional claims must fail as a matter of law.

For the reasons stated above, there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law pursuant to CR 56. Therefore, Plaintiff's motion for summary judgment is denied and summary judgment is granted to the Defendants.

This 5th day of March, 1999.

Garland W Howard

GARLAND W. HOWARD, Judge
Daviess Circuit Court, Div. I

COPIES MAILED TO:

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A TRUE COPY ATTEST:
PAT HARDESTY, CLERK
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BY K Wm Satt D.C.